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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CITY OF LOS ANGELES, Cross-complainant and Respondent, v. CBI SERVICES, INC., Cross-defendant and Appellant.	B170331 (Los Angeles County Super. Ct. No. BC208414)

APPEAL from an order of the Superior Court of Los Angeles County. Peter D. Lichtman, Judge. Reversed.

Thelen Reid & Priest, Timothy L. Pierce and Amy L. Rubinfeld for Cross-defendant and Appellant.

Rockard J. Delgadillo, City Attorney, Michael L. Claessens, Robert Cramer and Christine C. McCall, Assistant City Attorneys; Wickwire Gavin, David P. Dapper, Thomas J. Casamassima; Brown, Winfield & Canzoneri, Inc., Nowland C. Hong, Michael S. Simon, Brant H. Dveirin and Aimee Y. Wong for Cross-complainant and Respondent.

Interposed herein is this question: Can a trial court award attorney fees against a defendant for filing a frivolous appeal of the denial of a legally tenable but ultimately unsuccessful anti-SLAPP motion?[1] We hold that the power to punish a frivolous appeal lies with the Court of Appeal, not the trial courts. Therefore, the trial court's award of $174,480.50 in attorney fees against appellant CBI Services, Inc. (CBI) for filing a frivolous appeal must be reversed. If a respondent believes that an appeal is frivolous, the vehicle for recompense is a motion in the reviewing court for sanctions under California Rules of Court, rule 27(e).[2]

FACTS

This case arose out of a dispute over payment on a public works construction contract between respondent City of Los Angeles (the City) and the general contractor, Dillingham-Ray Wilson.[3] When Dillingham-Ray Wilson sued to recover money for extra work, it sought to recover on its own behalf, and also on behalf of various subcontractors, including CBI. The City cross-complained. In part, the City alleged that Dillingham-Ray Wilson and CBI violated Government Code sections 12650 et seq. by submitting false claims.

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[1] SLAPP is an acronym for strategic lawsuits against public participation. Code of Civil Procedure section 425.16 was designed by the Legislature to allow defendants to combat SLAPP suits. Subdivision (b)(1) of that statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] In relevant part, California Rules of Court, rule 27(e)(1), provides: "On a party's or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for: [¶] (A) taking a frivolous appeal or appealing solely to cause delay."

[3] Dillingham-Ray Wilson is not a party to this appeal.

CBI filed an anti-SLAPP motion, arguing that the City had cross-complained to retaliate against CBI for submitting claims as required by the contract and for exercising its right of petition. That motion was denied and CBI noticed an appeal. Soon thereafter, *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921 (*Kajima*) was published. Premised largely on *Kajima*, we affirmed the denial of the anti-SLAPP motion in *City of Los Angeles v. CBI Services, Inc.* (Jan. 16, 2003, B152094 [nonpub. opn.]).

Back in the trial court, the City moved for attorney fees pursuant to section 425.16, subdivision (c). At first it contended that the anti-SLAPP motion and the appeal were both frivolous and intended to cause delay. However, in its reply brief, it agreed that it was not entitled to its trial court attorney fees and withdrew that portion of its request. But it still continued to argue that CBI should have dismissed its appeal due to the subsequent publication of *Kajima*. The trial court agreed, finding that CBI's appeal lacked merit and was pursued solely for the purpose of causing unnecessary delay and harassing the City. The trial court awarded the City $159,480.50 in attorney fees related to the appeal, and then it also tacked on an extra $15,000 for the City's efforts in preparing and arguing its motion.

This timely appeal followed.

DISCUSSION

I.

Preliminarily, the City urges us to apply the waiver doctrine and preclude CBI's challenge to the trial court's power to award attorney fees on the grounds that CBI did not raise the issue below. In rejoinder, CBI contends that we may nonetheless reach this issue because it is purely legal.

It is true that reviewing courts are generally loathe to entertain an argument that is pulled out of an appellant's arsenal only after all is said and done below. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) But this rule, which has its origins in fairness to the opposing party and the trial court, is by no means an absolute. If the facts are undisputed,

then a party may raise a legal argument for the first time on appeal. (*Nippon Credit Bank v. 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486, 500.) Still, a party to an appeal is not privileged, as a matter of right, to do so. It is solely within the discretion of the reviewing court to entertain the matter or relegate it to the scrap heap with no more than a passing reference. (See *Gonzalez v. State Personnel Bd.* (1995) 33 Cal.App.4th 422, 431.) That said, if the new issue involves a matter of public interest or the due administration of justice, then the stakes are raised and an appellate court has an added reason to delve into the matter and resolve it. (See *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244.)

Because the issue presented is purely legal, and because is implicates the due administration of justice, we believe it should be considered.

Though not briefed and not necessary to our decision to consider the issue, we perceive an even mightier bulwark against waiver. When a trial court metes out an award it has no power to give, it acts in excess of jurisdiction. (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 312, p. 886.) At any stage of the legal process, a jurisdictional issue can be raised. It must be considered, even on appeal, regardless of the procedural posture. (See *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 721.)

II.

Whether a trial court has the power to award attorney fees is purely a question of law. We review legal issues from a clean slate. (See *Botello v. Shell Oil Co.* (1991) 229 Cal.App.3d 1130, 1134.)

If an anti-SLAPP motion is frivolous or solely intended to cause delay, a trial court must award attorney fees to a prevailing plaintiff. (§ 425.16, subd. (c).) The statute does not advert to appeals. Nonetheless, the established rule is that a "statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]" (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500 (*Evans*).)

The trial court was never asked to decide this issue, and it's ruling was consistent with the issues that were actually raised and discussed below. Now, however, CBI argues that because attorney fees were not authorized below, then they were not authorized on appeal. We concur.

The City takes the position that its award of $174,480.50 is sheltered under the umbrella of the rule in *Evans*. Seemingly, the City would have us don a pair of blinders. It cannot be gainsaid that the established rule has no applicability where, as here, attorney fees were *not* authorized in connection with the anti-SLAPP motion because it was never deemed frivolous or a tool for delay. In fact, the trial court encouraged CBI to appeal because the issue was close.

No case has dealt with this issue precisely. Nonetheless, *Dana Commercial Credit Corp. v. Ferns & Ferns* (2001) 90 Cal.App.4th 142, 146 (*Dana Commercial*) provides some guidance. A wrinkle in section 425.16, subdivision (c) is that it directs trial courts to make awards pursuant to section 128.5. *Dana Commercial* stated that "section 128.5 pertains to *trial court proceedings*." (*Dana Commercial, supra,* at p. 146.) The inference is that what a trial court is authorized to sanction relates only to what is before it. Moreover, the case the City relies on to demonstrate that a party can be sanctioned for a frivolous appeal cited section 907[4] and California Rules of Court, rule 27(e) as authority. (See *Cohen v. General Motors Corp.* (1992) 2 Cal.App.4th 893, 894.) Other cases, which were belatedly cited by the City -- such as *M.C.&D. Capital Corp. v. Gilmaker* (1988) 204 Cal.App.3d 671, 676-678 (*Gilmaker*) [the prevailing party in a contract action governed by Civil Code section 1717 can obtain attorney fees incurred at the trial court level and appellate court level through a motion in the trial court], *MST Farms v. C.G.* 1464 (1988) 204 Cal.App.3d 304, 308 ["in a proper case the trial court has jurisdiction to award, as an element of costs under [Civil Code] section 1717, attorney fees incurred by

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[4] Section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

the prevailing party in successfully defending or prosecuting an appeal"], *Harbour Landing-Dolfann, LTD. v. Anderson* (1996) 48 Cal.App.4th 260, 262 ["the trial court has jurisdiction to award attorney fees authorized by contract to the prevailing party on appeal as part of its costs on appeal after remittitur has issued, despite the absence of specific direction to do so from the appellate court"], and *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59 [a trial court can grant attorney fees pursuant to Civil Code section 1717 to the party who prevailed on appeal in a contract action] -- do not authorize a trial court to determine whether an appeal was frivolous.[5]

As a practical matter, the reviewing court is in the best position to determine whether an appeal was frivolous. In any event, there is no law permitting the trial court to make that determination. We cull from our review of the law these rules: (1) a party who deems an appeal frivolous must seek recompense through California Rules of Court, rule 27(e); and (2) absent an award by an appellate court, a trial court cannot award attorney fees incurred on appeal unless the prevailing party has a statutory right. (See *Gilmaker*, *supra*, 204 Cal.App.3d at p. 677 [explaining that costs on appeal normally do not include attorney fees but that "where the right is statutory, the trial court is authorized to award attorney's fees as part of costs on appeal notwithstanding a lack of direction in the remittitur"].)

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[5] These cases were cited by the City in a request that we vacate submission and allow briefing pursuant to Government Code section 68081 regarding the trial court's jurisdiction to award attorney fees. According to the City, we raised this issue sua sponte at oral argument. However, contrary to what the City suggests, the issue *was* raised and discussed by the parties. For example, on pages 23 and 24 of CBI's opening brief, CBI argued that the trial court's award was "legally improper" because it never found that the anti-SLAPP motion was frivolous or brought in bad faith. CBI pointed out that the relevant provisions governing improper appeals are in section 907 and California Rules of Court, rule 27. The City responded to this argument at pages 13 and 14 of its respondent's brief by citing *Evans* and arguing that because the anti-SLAPP statute authorizes attorney fees at the trial court level, it also authorizes them at the appellate court level. The parties did not use the word "jurisdiction" in their briefs, but they discussed the trial court's authority, which we consider synonymous for purposes of this opinion. Because Government Code section 68081 does not apply, we denied the City's request.

We note that at oral argument, the City argued for the first time that California Rules of Court, rule 870.2 authorized the award of attorney fees. It provides: "A notice of motion to claim attorney fees on appeal . . . under a statute or contract requiring the court to determine entitlement to the fees, the amount of fees, or both, shall be served and filed within the time for serving and filing the memorandum of costs under rule 26(d)." (Cal. Rules of Court, rule 870.2(c)(1).) While this rule sets a deadline for seeking attorney fees, it does not independently authorize them. Therefore, we have no choice but to reject the City's tardy argument.

DISPOSITION

The order is reversed.

CBI shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
NOTT